LIE KOK KEONG

v.

TANG CONTAINER & SERVICES SDN BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD FCJ
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: P-03-6-2001]
26 SEPTEMBER 2003

BANKRUPTCY: *Petition - Attestation - Whether creditor's petition attested by solicitor - Proof of - No affidavit to verify - Whether petition attested in Sarawak or Penang - Whether petition properly dated - Bankruptcy Rules 1969, r. 102*

BANKRUPTCY: *Petition - Attestation - Authority of solicitor to attest signature in creditor's petition - Whether advocate and solicitor of High Court in Malaya has authority to attest signature in Sarawak - Petition to be filed in Penang, effect of - Bankruptcy Rules 1969, r. 102*

This was an appeal by the judgment debtor ('the JD') against the decision of the judge-in-chambers upholding the order of the senior assistant registrar dismissing his application to strike out the creditor's petition filed by the judgment creditor ('the JC'). The JD's principal grounds of appeal were: (i) that the creditor's petition was not dated; and (ii) that the signature of one Tang Tze Yang ('TTY') on the creditor's petition was not attested in accordance with r. 102 of the Bankruptcy Rules 1969 ('the Rules).

Held (allowing the appeal):
Per Abdul Hamid Mohamad FCJ

[1] It was clear that the creditor's petition was dated 13 September 1999. Hence, the first ground of appeal was a non-issue. (p 290 e-g)

[2a] Apart from a statement from the bar, there was no evidence to support the JC's claim that the signature of TTY on the creditor's petition was attested by a solicitor in Kuching, Sarawak. Neither TTY nor the attesting solicitor filed any affidavits to verify such a claim. (pp 291 h & 292 a-b)

[2b] Even if the signature of TTY was indeed attested in Sarawak, the attestation must fail for want of authority. This is because an advocate and solicitor of the High Court in Malaya, not being authorised to practice in Sarawak, has **no** authority to attest a signature (in a creditor's petition) in Sarawak even though the petition is to be filed in Penang. (pp 292 f-g & 293 a-e)

[Judgment debtor's appeal allowed; no attestation or attestation bad in law.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh penghutang penghakiman ('JD') terhadap keputusan hakim dalam kamar kerana mengekalkan perintah penolong kanan pendaftar yang menolak permohonannya untuk mengetepikan petisyen pemiutang yang difailkan oleh pemiutang penghakiman ('JC'). Alasan-alasan utama rayuan JD adalah: (i) bahawa petisyen pemiutang tidak bertarikh; dan (ii) bahawa tandatangan seorang Tang Tze Yang ('TTY') pada petisyen pemiutang tidak disahkan mengikut per. 102 Peraturan-Peraturan Kebankrapan 1969 ('Peraturan').

Diputuskan (membenarkan rayuan):
Oleh Abdul Hamid Mohamad FCJ

[1] Ianya jelas bahawa petisyen pemiutang bertarikh 13 September 1999. Oleh itu alasan pertama rayuan adalah suatu 'non-issue'.

[2a] Selain dari kenyataan yang dibuat oleh peguamnya di dalam mahkamah, tidak ada suatu pun yang boleh menyokong dakwaan JC bahawa tandatangan TTY di petisyen pemiutang telah disahkan oleh peguamcara di Kuching, Sarawak. TTY dan peguamcara yang mengesahkan masing-masing tidak memfailkan apa-apa afidavit bagi membenarkan dakwaan tersebut.

[2b] Jikapun tandatangan TTY disahkan di Sarawak, pengesahan harus gagal kerana ketiadaan izin. Sebabnya ialah seorang peguambela dan peguamcara Mahkamah Tinggi di Malaya, yang tidak diizin beramal di Sarawak, tidak boleh mengesahkan suatu tandatangan (dalam suatu petisyen pemiutang) di Sarawak walaupun petisyen tersebut akan difailkan di Pulau Pinang.

Rayuan penghutang penghakiman dibenarkan; tiada pengesahan atau pengesahan tak sah di sisi undang-undang.]

Legislation referred to:
Bankruptcy Rules 1969, r. 102
Federal Constitution, art. 1
Interpretation Acts 1948 & 1967, s. 3

For the appellant/debtor - Yu Meng Queng; M/s Tan, Yu & Co
For the respondent/creditor - G Arumugam; M/s Ghazi, Lim & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad FCJ:
In this appeal, the appellant was the judgment debtor and the respondent was the judgment creditor, in the High Court.

The respondent had filed a creditor's petition against the appellant. The appellant filed an application to strike out the petition and the affidavit verifying petition. The application was dismissed by the senior assistant registrar. The appellant appealed to the judge in chambers who dismissed the appeal. The appellant appealed to this court.

Before us only two grounds were raised. We shall confine ourselves to those issues only.

The first ground is that the creditor's petition was not dated.

From the record, we see that at the bottom of p. 2 of the petition the date was written thus:

> Bertarikh pada 3 haribulan S 1999.

It is clear that number "1" and some letters are missing before number "3" and after letter "S", respectively. However, on the next page (p. 3) below the "Pengindorsan" the date was clearly written as "Bertarikh pada 13 haribulan September 1999". Further, the precipe chop on p. 1 of the petition clearly shows the date of filing as "13 September 1999".

This ground is a non-issue. It is clear that the petition was dated and that the date is 13 September 1999. This ground is dismissed.

The second ground is that the signature of Tang Tze Yang on behalf of the judgment creditor on the creditor's petition was not attested as required by r. 102 of the Bankruptcy Rules 1969.

Rule 102 reads:

> 102 Every bankruptcy petition shall be attested. If it be attested in the Federation the witness must be a Solicitor or Federal Counsel or Magistrate or Official Assignee or Registrar. If it be attested out of the Federation the witness must be a Judge or Magistrate or a Consul or Vice-Consul or a Notary Public.

The attestation reads:

> Tandatangan Saksi: (Sgd.)
> ...
> Jeyasingam Balasingam
> Advocate & Solicitor
> Penang
>
> Alamat: Di Tetuan Ghazi & Lim yang Beralamat
> Di Tingkat 19,
> Plaza MWE, No. 8 Lebuh Farquhar
> 10200 Pulau Pinang.
>
> Deskripsi: Peguambela dan Peguamcara
> Mahkamah Tinggi
> Negeri-Negeri Malaya.

The signing and the attestation took place on 13 September 1999.

On the other hand, the affidavit of truth of statement in petition, also affirmed by Tang Tze Yang on the same day states that it was affirmed in Kuching and before a commissioner for oaths in Kuching, Sarawak.

It was argued that Tang Tze Yang could not have signed two documents on the same day, one in Penang and one in Kuching.

The learned judge held that it was only an inference that the petition was signed and attested in Penang based on the solicitor's firm address in Penang. In other words, the learned judge accepted the explanation from the bar by learned counsel for the respondent that the petition was signed in Kuching before the attesting solicitor who was in Kuching.

But it should be noted that no affidavit was filed by the attesting solicitor to clarify the dispute. Tang Tze Yang, who affirmed and filed four affidavits besides the affidavit of truth of statement in the petition, too did not say where his signing and the solicitor's attestation took place.

Learned counsel for the respondent, in the course of his submission in the High Court, informed the court that the attesting solicitor in fact went to Kuching and attested the signature of Tang Tze Yang in Kuching. The learned judge appears to have accepted that assertion.

But, that is merely a statement from the bar. It is not evidence and should not have been accepted as evidence.

However, even if it is true that the attesting solicitor did go to Kuching and attested Tang Tze Yang's signature in Kuching, that raises another point of law: Has an advocate and solicitor of High Court Malaya the authority to attest a signature in Kuching, Sarawak?

From r. 102 of the Bankruptcy Rules 1969 reproduced earlier we note that if a petition is attested in the Federation, the witness must be a solicitor or Federal Counsel or Magistrate or official assignee or registrar. If it be attested out of the Federation the witness must be a judge or Magistrate or a Consul or Vice-Consul or a Notary Public.

There is no doubt an attestion in Sarawak is an attestation "in the Federation". Sarawak is part of the "Federation" – see art. 1 of the Federal Constitution and s. 3 of the Interpretation Acts 1948 and 1967. But, does that mean that an advocate and solicitor of High Court Malaya may attest a signature in Sarawak?

The Bankruptcy Act 1967 does not interpret the word "solicitor" but it interprets the word "advocate" to mean "any person entitled to practise as an advocate or as a solicitor or as an advocate and solicitor under any law in any part of Malaysia".

It appears that so long as a person is entitled to practise as an advocate and/or solicitor in any part of Malaysia he is an advocate for the purpose of the Act and the rules. In view of the fused profession in Malaysia this definition of "advocate" in our view applies equally to "solicitor".

But, that still does not solve the problem. What does the phrase "entitled to practise … in any part of Malaysia" mean? Does it mean that so long as he is entitled to practise in one part of Malaysia he is authorized to attest in all parts of Malaysia?

We have no doubt that attesting a petition is "practice". So, if we were to say that an advocate and solicitor who is entitled to practise in Malaya only may attest a petition in Sarawak, in effect we would be saying that an advocate and solicitor of the High Court Malaya may also automatically practise in Sarawak. But, that is not the law. Further more, if we were to say so, it would also mean that, if the attestation is done outside the Federation, then a Judge of Indonesia can attest the petition in Singapore. That again cannot be so. An Indonesian Judge may attest in Indonesia just as a Singapore Judge may attest in Singapore a petition to be filed in Malaysia. By way of analogy, as an advocate and solicitor in Malaya is not authorized to practise in Sarawak, he too cannot attest a petition in Sarawak even though the petition is to be filed in Penang (Malaya).

So, if the petition was attested in Sarawak it is not a valid attestation.

Was it attested in Penang then? No evidence was produced to say that the petition was attested in Penang. Indeed, that is not the respondent's case. The respondent's case is that it was attested in Kuching but again there is no evidence to that effect, only a statement from the bar. So, we are left in a dilemma. It is not for the court to make a finding of facts based on guesswork. It is for the respondent to produce evidence as to where the attestation took place so that the court can make a finding of facts and consider its legality. The respondent has failed to do so.

Since there is no evidence that the petition was attested either in Penang or Sarawak, and since, even if it was attested in Sarawak as claimed by the learned counsel for the respondent such attestation is done without authority, the attestation is bad in law.

We therefore allow the appeal with costs here and in the court below and order that the deposit be refunded to the appellant.